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IN THE

Supreme Court of the United States

October Term, 1964

NO._____

J. H. PAGE, ET AL., *Petitioners*

v:

PAN AMERICAN PETROLEUM CORPORATION, ET AL., *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE THIRTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS AT CORPUS CHRISTI, TEXAS

To The Honorable Supreme Court Of The United States:

Petitioners pray that a Writ of Certiorari issue to review the judgment of the Court of Civil Appeals for the Thirteenth Supreme Judicial District of Texas entered in the above entitled case on the 27th day of August, 1964. A certified copy of the Opinion Below of the Court of Civil Appeals has been made a part of the Record, and is reported in 381 S.W.2d 949, et seq.

JURISDICTION

The judgment of the Court of Civil Appeals was entered on July 27, 1964. Motion for Rehearing was filed September 11, 1964 and overruled September 24, 1964. On January 13, 1965 Petition for a Writ of Error was refused by the Supreme Court of Texas and a Motion for Rehearing was overruled on February 24, 1965 (See Certificate of Margaret M. Blackmon, Clerk of the Court of Civil Appeals.)

The jurisdiction of this Court is invoked under the following Amendments to the Constitution of the United States:

Amendment 5 (Due Process), Appendix A, p. 11;
Amendment 7 (Right of Trial by Jury), Appendix A,
Amendment 14 (Due Process and Equal Protection)
Appendix A, p. 11;

28 U.S.C.A. Sec. 1257 (3), Appendix A, 12.

QUESTION PRESENTED

Whether the Trial Court was correct in denying Petitioners a jury trial and in granting Respondents' Motion for a Summary Judgment for title to and possession of the tract of valuable land involved, where Respondents relied for title upon the presumption of a grant or deed.

STATUTES INVOLVED

In this controversy the following state constitutional provision and Rules of Civil Procedure are involved:

Article 1, Section 15, Texas State Constitution;
Rule 216, Texas Rules of Civil Procedure;
Rule 166A, Texas Rules of Civil Procedure;

These are printed in Appendix A, pp. 12 and 13.

STATEMENT

This action was commenced in the Trial Court as a suit to try the title to a tract of land located in Brazoria County, Texas, and for damages. The land is described in Plaintiff's Original Petition (Transcript, pp. 54 et seq., R._____). The action is basically a suit in Trespass to Try Title, authorized by Art. 7364, V.A.C.S. of Texas (Appendix A, p. 15) and Rules 783, 784 and 785, Texas Rules of Civil Procedure. (Appendix A, pp. 15 and 16).

Respondents timely answered, and then followed with a Motion for Summary Judgment (Tr. 23, R._____). to which Petitioners replied, (Tr. 48, R._____) and Respondents then followed with an amendment to Defendants' Motion for Summary Judgment. (Tr. 60, R._____).

Plaintiffs' (Petitioners') Original Petition was filed in the District Court of Brazoria County, Texas, on June 19, 1958 (Tr. 8, R_____). A jury fee was paid by Petitioners on January 13, 1960 (Second Supplemental Transcript, not filed in the Court of Civil Appeals or Supreme Court, but certified by the Clerk of the District Court of Brazoria County, Texas, pp. 1-6, R._____).

Respondents' Motion for Summary Judgment (Tr. 23-41, R._____ was filed on October 27, 1960 (Tr. 41, R._____) and their Amendment and Supplement to their Motion for Summary Judgment was filed April 23, 1962.

Judgment sustaining Respondents' Motion for Summary Judgment was rendered and entered on September 9, 1963. (Tr. 76, R._____).

In opposition to Respondents' Motion for Summary Judgment, Petitioners filed, among others, the affidavit of

King Webb, (Tr. 66, R._____).

Petitioners' title consists of the following:

(1) Grant from the Mexican Government to Imla Keep dated July 24, 1824 (Exhibits to Respondents' Motion for Summary Judgment—Part II, No. 1).

(2) Deed from Martin Varner, Attorney in Fact for Imla Keep to Elizabeth Clark, dated July 2, 1829. (Same—No. 2).

(3) Probate proceedings in the Matter of the Succession of Anthony R. Clarke, dec'd., Eliza Chase (formerly Page) dec'd., and Samuel Harrison Page, Minor. (Same—No. 3).

(4) Deed from Joseph W. Page to John Sweeney—undated, but filed in the deed records of Brazoria County, Texas on December 24, 1839. (Same—No. 5).

Respondents' title is bottomed upon a presumption of a deed, as appears from the judgment entered by the Trial Court.

ARGUMENT OF REASONS FOR GRANTING THE WRIT, AND AUTHORITIES

The Trial Court improvidently granted Respondents' Motion for Summary Judgment. The affirmance of this action by the Texas Appellate Courts is a use of the Judicial Process to deprive Petitioners of their property without benefit of a trial.

Both the Federal and Texas Constitutions assure to litigants a trial by jury. This is not an absolute right, it

is conceded but, when, as in this case, a jury fee has been timely paid, the Court should exercise extreme caution to guard this traditional right to a jury trial.

In *Whitehead v. Shattuck,* 11 S.Ct. 276, 138 U.S. 151, 34 L.Ed. 873, Justice Field held that in an action for the recovery of real property and damages, *both* parties have a Constitutional right to a jury trial. (Appendix B, page 22).

This construction of the 7th Amendment has been followed by the lower courts. *Chichester v. Kramer,* 157 Fed. Supp. 79; *U. S. v. Standard Oil Company of California,* 20 Fed. Supp. 427.

The Texas Courts hold that a trial by jury is a fundamental right. In *Clayton v. Clayton,* 308 S.W.2d 557 (No writ history) the Texarkana Court of Civil Appeals said:

> "It is fundamental to our system of justice and the intention and policy of the law to permit all persons to have a trial by jury of any facts affecting their property rights." (Loc. Cit. pg. 564)

The Dallas Court of Civil Appeals gave its construction of Article 1, Sec. 15 of the Texas Constitution providing that the right of trial by jury shall remain inviolate, holding that such provision is subject to certain procedural rules, such as the timely payment of a jury fee. Aragoff v. Texas Turnpike Authority, 299 S.W.2d 342 (App. B, pg. 23)

By the adoption of Rule 166-A, Texas Rules of Civil Procedure, taken from Federal Rule 56 (Appendix A, page 13), our Supreme Court has determined that where no genuine issue of a material fact is made to appear, the Trial Court may grant a Motion for Summary Judgment, without trial.

These rules, 166-A and Federal Rule 56 have been construed by courts of last resort.

Discussing Rule 56, Mr. Justice Jackson of this Court held that it is not the purpose of the rule to deprive litigants of their right to a jury trial where there are issues to try.

In *Associated Press v. United States*, 65 S.Ct. 1416, 326 U.S. 1, 89 L.Ed. 2013, Justice Black of this Court held that "Rule 56 should be cautiously worked to the end that parties may always be afforded a trial where there is a bona fide dispute between them." (Loc. Cit. 326 U.S. 6.)

Trial Courts have been repeatedly admonished to "exercise great care" in granting motions for summary judgment. *Dobler Metal Furniture Co. Inc. v. U. S.*, 149 F.2d 130 (Appendix B, page 25); *Bozant v. Bank of New York*, 151 F.2d 787. (Appendix B, page 25.)

Rule 166-A, Texas Rules of Civil Procedure has been given thoughtful attention by Justice Griffin of the Texas Supreme Court in *Gulbenkean v. Penn*, 151 Texas, 412, 252 S.W.2d 929. His reasoning as to the application of the Rule coincides with that of this Court. Such a motion should not be granted if there are facts to be tried, or the credibility of witnesses is to be weighed and the case thus tried on affidavits (Appendix B, page 27.)

The doctrine of "presumption of a lost grant" is indulged only where there has been long-continued, undisturbed possession of land. It is discussed in 2 C.J.S. 874, Par. 2311 b. (Appendix B, page 26.)

The doctrine has been rather extensively employed in Texas. Speaking for our Supreme Court, Justice Critz said:

> "In order to establish a presumptive conveyance, there must be a long and notorious claim of ownership, nonclaim by the ostensible owner, and acquiescene on the part of the ostensible owner in the claim of the adverse party." *Love v. Eastham*, 137 Tex. 462, 154 S.W.2d 623.

Early in this State's jurisprudence, it was recognized that the presumption of a grant is one of *fact*. (Emphasis supplied.) *Taylor v. Watkins*, 26 Tex. 688.

In 1890 Justice Gaines held that the presumption of a grant arising from long continued possession is one of *fact*. *Walker v. Sharp*, 78 Tex. 489, 15 S.W. 31. (Appendix B, page 28.)

Again in 1896, Justice Gaines speaking for the Texas Supreme Court held in the most certain terms possible to employ that the presumption is one of fact for a jury to determine. *Herndon v. Vick*, 89 Tex. 469, 35 S.W. 141. (Appendix B, page 29.)

In *Gibbs v. Carlisle*, 98 S.W. 192 (no writ history) Justice Fly of the Court of Civil Appeals held the doctrine to be one of fact, but not a presumption of law. (Appendix B, page 29.)

The rule laid down in *Herndon v. Vick*, supra, is recognized and followed in *Price v. Humble Oil and Refining Company*, 152 S.W.2d 804 (E.R. w.o.m.).

The author of the opinion there says:

> "Likewise, it has long been held that an issue raising proof of deed by circumstances, or by presumptive

evidence, involves presumptions of fact, and is for the jury. Herndon v. Vick, 89 Tex. 469, 35 S.W. 141." (Emphasis supplied)

Many reported cases hold that presumption of a grant is a question of fact, and not one of law.

Texas Tram & Lumber Co. v. Givin, 52 S.W. 110 (No writ);
Veath v. Gray, 21 S.W. 324 (E.R.);
Jante v. Culbreath, 101 S.W. 279 (No writ);
Texas Land and Cattle Co. v. Walker, 105 S.W. 545 (No writ)
White v. McCullouth, 120 S.W. 1093 (No writ).

So far as the writer has been able to determine after diligent, if not exhaustive search, this Court has never overruled—or even questioned the soundness of *Herndon v. Vick*, 89 Tex. 469, 35 S.W. 141.

This case should have been tried by a jury.

(1) The doctrine of presumption of a grant is one of fact to be determined by the jury, where, as in this case, one has been properly requested.

(2) There are issues of fact for the jury to resolve raised by:

(a) The probate proceedings pertaining to the estate of Elizabeth Page and Samuel Harrison Page.

(b) The deed from Joseph W. Page to John Sweeney conveying 1/2 of the upper 1/8 of the Imla Keep League only.

(c) The affidavit of King Webb.

CONCLUSION

Petitioners respectfully pray that this petition for a writ of certiorari should be granted for the foregoing reasons.

Respectfully submitted,

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A copy of Petitioners' Petition for Writ of Certiorari has been furnished by United States mail to the attorneys for Respondents:

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APPENDIX "A"

Amendment V — Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process; Just Compensation For Property

United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VII — Civil Trials

United States Constitution

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Amendment XIV—Citizenship; Privileges And Immunities; Due Process; Equal Protection; Apportionment Of Representation; Disqualification Of Officers; Public Debt; Enforcement

United States Constitution

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens

of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sections 2-5 omitted.

Title 28 USCA.

Section 1257. State courts; appeal; certiorari

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

ARTICLE 1, SECTION 15

Texas Constitution

The right of trial by jury shall remain inviolate. The Legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency. Provided, that the Legislature may provide for the temporary commitment, for observation and/or treatment, of mentally ill persons not charged with a criminal offense, for a period of time not to exceed ninety (90) days, by order of the County Court without the necessity of a trial by jury. As amended August 24, 1935.

RULE 216. Fee

Texas Rules of Civil Procedure

No jury trial shall be had in any civil suit, unless application be made therefor and unless a fee of five dollars, if in the district court, and three dollars if in the county court, be deposited by the applicant with the clerk to the use of the county on or before appearance day or, if thereafter, a reasonable time before the date set for trial of the cause on the non-jury docket, but not less than ten days in advance. The clerk shall promptly enter a notation of the payment of such fee upon the court's docket sheet. As amended by order of March 31, 1941; order of Sept. 20, 1941, effective Dec. 31, 1949; and by order of Oct. 12, 1949, effective March 1, 1950.

RULE 166-A. Summary Judgment

Texas Rules of Civil Procedure

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the adverse party has appeared or answered, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to amount of damages.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least ten days before the time specified for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissable in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavits facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt. Promulgated by order of October 12, 1949, effective March 1, 1950. As amended by order of October 10, 1951, effective March 1, 1952.

ART. 7364. (7731) (5248) (4784) Method of trying titles V.A.C.S.—Texas

All fictitious proceedings in the action of ejectment are abolished. The method of trying titles to lands, tenements or other real property shall be by action of trespass to try title. Act Feb. 5, 1840; G.L. vol. 2 p. 310.

RULE 783. Requisites of Petition

Texas Rules of Civil Procedure

The petition shall state:

(a) The real names of the plaintiff and defendant and their residences, if known.

(b) A description of the premises by metes and bounds, or with sufficient certainty to identify the same, so that from such description possession thereof may be delivered, and state the county or counties in which the same are situated.

(c) The interest which the plaintiff claims in the premises, whether it be a fee simple or other estate; and, if he claims an undivided interest, the petition shall state the same and the amount thereof.

(d) That the plaintiff was in possession of the premises or entitled to such possession.

(e) That the defendant afterward unlawfully entered upon and dispossessed him of such premises, stating the date, and withholds from him the possession thereof.

(f) If rents and profits or damages are claimed, such facts as show the plaintiff to be entitled thereto and the amount thereof.

(g) It shall conclude with a prayer for the relief sought.

RULE 784. The Possessor Shall Be Defendant

Texas Rules of Civil Procedure

The defendant in the action shall be the person in possession if the premises are occupied, or some person claiming title thereto in case they are unoccupied.

RULE 785. May Join As Defendants, When

Texas Rules of Civil Procedure

The plaintiff may join as a defendant with the person in possession, any other person who, as landlord, re-

mainderman, reversioner or otherwise, may claim title to the premises, or any part thereof, adversely to the plaintiff.

ARTICLE 7364. (7731) (5248) (4784) Method of Trying Titles

V.A.C.S.—Texas

All fictitious proceedings in the action of ejectment are abolished. The method of trying titles to lands, tenements or other real property shall be by action of trespass to try title. Act Feb. 5, 1840; G.L. vol. 2 p. 310.

ARTICLE 7366. Requisites of Petition. The petition shall state:

V.A.C.S.—Texas

(1) (a) The real names of the plaintiff and defendant and their residences, if known.

(2) (b) (It shall describe) A description of the premises by metes and bounds, or with sufficient certainty to identify the same, so that from such description possession thereof may be delivered, and state the county or counties in which the same are situated.

(3) (c) The interest which the plaintiff claims in the premises, whether it be a fee simple or other estate; and, if he claims an undivided interest, (he) the petition shall state the same and the amount thereof.

(4) (d) That (he) the plaintiff was in possession of the premises or entitled to such possession.

(5) (e) That the defendant afterward unlawfully entered upon and dispossessed him of such premises, stating the date, and withholds from him the possession thereof.

(6) (f) If rents and profits or damages are claimed, such facts as show the plaintiff to be entitled thereto and the amount thereof.

(7) (g) It shall conclude with a prayer for the relief sought.

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The plaintiff may join as a defendant with the person in possession, any other person who, as landlord, remainderman, reversioner or otherwise, may claim title to the premises, or any part thereof, adversely to the plaintiff.

RULE 56. Summary Judgment

Federal Rules of Civil Procedure

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. As amended Dec. 27, 1946, effective March 19, 1928.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. As amended December 27, 1946, effective March 19, 1948.—The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is neces-

sary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for sum-

mary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him. As amended Jan. 21, 1963, effective July 1, 1963.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made In Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

APPENDIX "B"

Whitehead v. Shattuck, 11 S.Ct. 276, 138 U.S. 151, 34 L.Ed. 873.[1] The Seventh Amendment of the Constitution of the United States declares that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." That provision would be defeated if an action at law could be tried by a court of equity, as in the latter court a jury can only be summoned at its discretion, to ascertain special facts for its enlightenment. Lewis v. Cocks, 90 U.S. 23 Wall, 466, 470 (23:70, 71); Killian v. Ebbinghaus, 110 U.S. 568, 573 (28: 246, 248); Buzard v. Houston, 119 U.S. 347, 351 (30: 451, 452). And so it has been held by this court 'that whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury.' Hipp v. Babin, 60 U.S. 19 How. 271, 278 (15: 633, 635.)

It would be difficult and perhaps impossible, to state any general rule which would determine in all cases what should be deemed a suit in equity as distinguished from an action at law, for particular elements may enter into consideration which would take the matter from one court to the other; but this may be said, that where an action is simply for the recovery and possession of specific real or personal property, or for the recovery of a money judgment, the action is one at law. An action for the recovery of real property, including damages for withholding it, has always been of that class. The right which in this case the p...ntiff wishes to assert is his title to certain

real property; the remedy which he wishes to obtain is its possession and enpoyment; and in a contest over the title both parties have a constitutional right to call for a jury."

Aronoff v. Texas Turnpike Authority, 299 S.W.2d 342. "(1) Article I, sec. 15 of the Constitution of Texas, Vernon's Ann. St. provides: 'The right of trial by jury shall remain inviolate.' Nevertheless trial by jury in Texas is not an absolute right in civil cases. It is subject to certain procedural rules. One of these rules is that a jury fee shall be paid ten days prior to trial. Rule 216, Vernon's Texas Rules of Civil Procedure."

Sartor v. Arkansas Natural Gas Corporation, 64 S.Ct. 724, 321 U.S. 620, 88 L.Ed. 967. "(5) The Court of Appeals below heretofore has correctly noted that Rule 56 authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, that no genuine issue remains for trial, and that *the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try.* American Insurance Co. v. Gentile Brothers Co., 109 F.2d 732; Whitaker v. Coleman, 115 F.2d 305. In the very proper endeavor to terminate a litigation before it for the fourth time, we think it overlooked considerations which make the summary judgment an inappropriate means to that very desirable end.

"(6-8) In considering the testimony of expert witnesses as to the value of gas leases, this Court through Mr. Justice Cardozo has said: 'If they have any probative effect, it is that of expressions of opinion by men familiar with the gas business and its opportunities for profit. But plainly opinions thus offered, even if entitled to some weight, have no such conclusive force that there is error

of law in refusing to follow them. This is true of opinion evidence generally, whether addressed to a jury * * * or to a judge * * * or to a statutory board.' Dayton Power & Light Co. v. Public Utilities Commission, 292 U.S. 290, 299, 54 S.Ct. 647, 652, 78 L.Ed. 1267. Cf. Halliday v. United States, 315 U.S. 94, 97, 62 S.Ct. 438, 440, 86 L.Ed. 711; Forsyth v. Doolittle, 120 U.S. 73, 77, 7 S.Ct. 408, 410, 30 L.Ed. 386; McGowan v. American Pressed Tan Bark Co., 121 U.S. 575, 609, 7 S.Ct. 1315, 1334, 30 L.Ed. 1027; Quock Ting v. United States, 140 U.S. 417, 420, 11 S.Ct. 733, 734, 851, 35 L.Ed. 501; Head v. Hargrave, 105 U.S. 45, 50, 26 L.Ed. 1028; Union Insurance Co. v. Smith, 124 U.S. 405, 423, 8 S.Ct. 534, 544, 31 L.Ed. 497. The rule has been stated 'that if the court admits the testimony, then it is for the jury to decide whether any, and if any what, weight is to given to the testimony.' Spring Co. v. Edgar, 99 U.S. 645, 658, 25 L.Ed. 487. '* * * the jury, even if such testimony be uncontradicted, may exercise their independent judgment.' The Conqueror, 166 U.S. 110, 131, 17 S.Ct. 510, 518, 41 L.Ed. 937. '* * * the mere fact that the witness is interested in the result of the suit is deemed sufficient to require the credibility of his testimony to be submitted to the jury as a question of fact.' Sonnentheil v. Christian Moerlein Brewing Co., 172 U.S. 401, 408, 19 S.Ct. 233, 236, 43 L.Ed. 492.

"(9) This Court has said: 'The jury were the judges of the credibility of the witnesses * * * and in weighing their testimony had the right to determine how much dependence was to be placed upon it. There are many things sometimes in the conduct of a witness upon the stand, and sometimes in the mode in which his answers are drawn from him through the questioning of counsel, by which

a jury are to be guided in determining the weight and credibility of his testimony. That part of every case, such as the one at bar, belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men; and, so long as we have jury trials, they should not be disturbed in their possession of it, except in a case of manifest and extreme abuse of their function.' Aetna Life Insurance Co. v. Ward, 140 U.S. 76, 88, S. Ct. 720, 724, 35 L.Ed. 371."

Doehler Metal Furniture Co. Inc., v. U.S., C.C.A. 2d, 1945, 149 F.2d 130. "We take this occasion to suggest that trial judges should exercise great care in granting motions for summary judgment. A litigant has a right to a trial where there is the slightest doubt as to the facts, and a denial of that right is reviewable; but refusal to grant a summary judgment is not reviewable. Such a judment, wisely used, is a praiseworthy time-saving device. But, although prompt dispatch of judicial business is a virtue, it is neither the sole nor the primary purpose for which courts have been established. Denial of a trial on disputed facts is worse than delay."

Bozant v. Bank of New York, C.C.A. 2d, 1946, 156 F.2d 787. "In conclusion we cannot avoid observing that the case is another mistaken effort to save time by an attempt to dispose of a conplicated state of facts on motion for summary judgment. This is especially true when the plaintiff must rely for his case on what he can draw out of the defendant. Arnstein v. Porter, C.C.A. 2d, 1946, 154 F.2d 464. It appears to be somewhat difficult to persuade the district courts of this; but we are satisfied that it is true."

2 *C.J.S.* 874, 231, *b. General Rule.* "Long-continued, undisturbed possession of real property, accompanied by corroborating circumstances, gives rise to a presumption of a lost grant to the occupant, or to one through whom he claims.

"In the absence of the record of a previous deed or grant from the first grantor in claimant's chain of title, it is a general rule that long-continued, undisturbed possession of real property by claimant and his grantors, accompanied by the usual claim and acts of ownership, or by other corroborating circumstances, justifies the presumption of a lost grant of the property in question to the occupant or to his predecessors in title, as where it appears from such facts and circumstances to be more probable that the deed or other muniment of title in question had been executed than that it had not been.

"The presumption has been held to arise where, in addition to long-continued possession, the occupant has held at least part of the time under color of title, or under a contract of purchase, and paid the purchase money, or has openly asserted title to the property, or paid taxes thereon as if it were his own, or has had the beneficial use of the property, and made improvements thereon, of where the opposing party, charged with knowledge thereof, has acquiesced in claimant's occupancy. The presumption of a grant has also been held to arise where, in addition to long-continued possession, there has been record evidence supporting the claim, but it is not sufficient ground for presuming an ancient deed that the party to whom it must be presumed such deed, if any, was executed, and his grantees, have on record subsequent deeds of the same property, and have been recognized by other proprietors as the proprietors of such property."

Gulbenkian v. Penn, 151 Texas 412, 252 S.W.2d 929:

"We adopted this rule from Federal Rules of Civil Procedure rule 56, 28 U.S.C.A., and that rule has been construed as allowing summary judgments only when there is no disputed fact issue. The duty of the court hearing the motion for summary judgment is to determine if there are any issues of fact to be tried, and not to weigh the evidence or determine its credibility, and thus try the case on the affidavits. King v. Rubinsky, Tex.Civ.App. 1951, 241 S.W.2d 220 (1), no writ history; Haley v. Nickels, Tex.Civ.App. 1950, 235 S.W.2d 683, 685 (5), no writ history. As said in the case of Kaufman v. Blackman, Tex.Civ.App., 239 S.W.2d 422, 428, writ refused, N.R.E., "The underlying purpose of Rule 166-A was elimination of patently unmeritorious claims or untenable defenses; not being intended to deprive litigants of their right to a full hearing on the merits of any real issue of fact." *The burden of proving that there is no genuine issue of any material fact must be resolved against the party moving for a summary judgment."* De La Garza v. Ryals, Tex.Civ.App. 1951, 239 S.W.2d 854 (4), 856, writ ref. N.R.E.; Sarnoff v. Ciaglia, 3 Cir., 165 F.2d 167, 168; McDonald, Texas Civil Practice, Vol. 4, Sec. 17.26 (I), p. 1380, and authorities there cited. Id. p. 1392 (VI); 2 Baylor Law Rev. 330. "In determining a motion thus depending upon extrinsic evidence, the court's task is analogous to that which he performs on a motion for directed verdict. *He accepts as true all evidence of the party opposing the motion which tends to support such party's contention, and gives him the benefit of every reasonable inference which properly can be drawn in favor of his position."* McDonald, Texas Civil Practice Vol. 4, 17.26, p. 1394, and authorities there cited; 41 Am. Jur., Pleading, Sec. 173, p. 415; Id. Sec. 342, p. 525; 30 Tex. Law Rev. 302; 2 Baylor Law Rev. 328; 18 Tex. Bar Journal, Robt. W. Stayton, "Notes on Summary Judgment", September 1950, p. 474.

The general rule is that if a motion involves the credibility of affiants or deponents, or the weight of the showings or, it is said, a mere ground of inference, the motion will not be granted. Sarton v. Arkansas Natural Gas Corp., 321 U.S. 620, 64 S.Ct. 724, 88 L.Ed. 967; Sarnoff v. Ciaglia, supra; Fogelson v. American Woolen Co., 2 Cir., 170 F.2d 660; Fireman's Mutual Ins. Co. v. Aponaug Mfg. Co., 5 Cir., 149 F.2d 359; Ernstein v. Porter, 2 Cir., 154 F.2d 464; Boro Hall Corp. v. General Motors Corp., 2 Cir., 164 F.2d 770; Pierce v. Ford Motor Co., 4 Cir., 1951, 190 F.2d 910."

Walker v. Sharp, 78 Tex. 489, 15 S.W. 31:

"The presumption of a grant which arises from the long-continued possession and use of real property *is a presumption of fact*, and can only have a controlling effect upon the title when all the circumstances in proof are consistent with the existence of a conveyance. Taylor v. Watkins, 26 Tex. 688. It is not arbitrarily indulged in favor of long adverse possession merely, but should only be given effect when the circumstances in proof in the particular case are sufficient to induce the belief that a legal conveyance, under which the possession has been taken and held, has been in fact made.

Now presumptions of grant have usually been applied to incorporeal hereditaments. For example, when the owner of land has seen another use a way over it for 20 years, and where such use has been inconsistent with the idea that it did not have a legal origin, the presumption of a grant may become conclusive. But it is apparent that in such a case the presumption derives its main support from the acquiescence of the owner of the fee. So, also, one who has the apparent title to a tract of land, knowing another has

taken adverse possession, acquiesces in such adverse possession, acquiesces in such adverse enjoyment of the property for a period of 20 years, a *jury* would be justified in presuming a grant in the absence of circumstances tending to a contrary conclusion." (Emphasis supplied)

Herndon v. Vick, 89 Tex. 469, 35 S.W. 141:

"But it is insisted on behalf of defendant in error that should this court hold that the trial court erred in excluding the evidence of the transfer from Dickinson to Cole, the judgment should nevertheless be affirmed. The ground of this contention is that the proof of the long and continued possession, use, and enjoyment of the land in controversy, under a claim of title, by defendant in error and those under whom he claims, together with the evidence that no claim had ever been asserted on behalf of the plaintiff in error until the bringing of this suit, is so conclusive in its nature and tendency as to impel the court to presume a sale or conveyance from Cole back to the original grantee, should it be found that Cole ever possessed the title. *It has doubtless been held, in other jurisdictions, that the inference arising from long possession and enjoyment of real estate, together with corroborating circumstances, may be so cogent as to make it the duty of the court to instruct the jury to presume a grant. Such is not the rule in this State. With us the presumption is one of fact, and it is for the jury to determine the effect of the evidence in support of that presumption.* Taylor v. Watkins, 26 Tex. 688; Walker v. Caradine, 78 Tex. 489, 15 S.W. 31; Dailey v. Starr, 26 Tex. 562." (Emphasis supplied)

Gibbs v. Carlisle, 98 S.W. 192:

"Whatever may have been the rule at one time in this state, or in other jurisdictions, it is firmly settled,

by the later decisions in Texas, that the presumption of a grant arising from possession and other circumstances is one of fact and not of law. Dailey v. Starr, 26 Tex. 562; Taylor v. Watkins, 26 Tex. 688; Harrison v. McMurray, 71 Tex. 122, 8 S.W. 612; Walker v. Caradine, 78 Tex. 489, 15 S.W. 31; Railway v. Uribe, 85 Tex. 386, 20 S.W. 153; Herndon v. Vick, 89 Tex. 469, 35 S.W. 141; Herndon v. Burnett, 21 Tex. Civ.App. 25, 50 S.W. 581; Darsey v. Sternenberg (Tex. Civ. App.) 94 S.W. 413, 15 Tex. Ct. Rep. 860. In the cited case of Taylor v. Watkins, Judge Bell, after reviewing authorities on the subject, said: "*I draw the conclusion from what has been said, that the question whether a grant will be presumed or not is a question for the jury; in other words, that the court ought always to leave it to the jury to presume a grant or not, according to the evidence and circumstances of the case; that the presumption of a grant does arise from long and uninterrupted possession,* where the possession is consistent with the presumption, and that the jury may properly be told thus much as matter of law, *but that the presumption may be repelled by proof.*" In the case of Walker v. Caradine, before cited, it was said: "The presumption of a grant which arises from long-continued possession and use of real property is a presumption of fact, and can only have a controlling effect upon the title when all the circumstances in proof are consistent with the existence of a conveyance. In the latest decision of the Supreme Court on the subject, in the case of Herndon v. Vick, above cited, it was said by Chief Justice Gaines: "But it is insisted on behalf of defendant in error that, should this court hold that the trial court erred in excluding the evidence of the transfer from Dickinson to Cole, the judgment should nevertheless be affirmed. The ground of this contention is that the proof of the long and continued possession, use, and an enjoyment of the land in controversy, under a claim of title by de-

fendant in error and those under whom he claims, together with the evidence that no claim had ever been asserted on behalf of the plaintiff in error until the bringing of this suit, is so conclusive in its nature and tendency as to impel the Court to presume a sale or conveyance from Cole back to the original grantee, should it be found that Cole ever possessed the title. *It has doubtless been held in other jurisdictions that the inference arising from long possession and enjoyment of real estate, together with corroborating circumstances, may be so cogent as to make it the duty of the court to instruct the jury to presume a grant. Such is not the rule in this State.* With us the presumption is one of fact, and it is for the jury to determine the effect of the evidence in support of that presumption." The effect of the authorities cited, as well as others, is to establish the rule that a conveyance of real property may be established by circumstances, such as long possession and enjoyment of it, *and that such circumstances must be submitted to the jury to be determined by them whether or not they will support the presumption or inference of a grant or conveyance. In other words that such circumstances may create a presumption of fact, but not a presumption of law.*" (Emphasis supplied)